# STATE OF MICHIGAN

# COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PATRICIA ANN PLUMMER,

Defendant-Appellant.

UNPUBLISHED
September 18, 2003

No. 237814
Genesee Circuit Court
LC No. 01-007540-FH

Before: Bandstra, P.J., and White and Donofrio, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of first-degree felony murder, MCL 750.316, and one count each of conspiracy to commit armed robbery, MCL 750.529, 750.157a, armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was subsequently sentenced to concurrent terms of life imprisonment for the murder, conspiracy, and armed robbery convictions, to be preceded by the mandatory two-year term for her conviction of felony firearm. Defendant appeals as of right. We affirm.

This case arises from the robbery and murder of two brothers, John and Kim Crider, near the city of Flint. Defendant, along with codefendants Tina Clarke and Kevin Debus, were jointly tried for these crimes, although each was afforded a separate jury. On appeal, defendant challenges the sufficiency of the evidence to support her convictions of felony murder, as well as the trial court's decision to permit codefendant Debus to testify before her jury despite late endorsement of Debus as a witness by the prosecution.

## I. Sufficiency of the Evidence: Felony Murder

When reviewing a claim of insufficient evidence, this Court views the evidence in a light most favorable to the prosecution and determines whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Hardiman*, 466 Mich 417, 421; 646 NW2d 158 (2002). We also make credibility choices in support of the jury verdict, *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000), and resolve all conflicts in the evidence in favor of the prosecution, *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). Circumstantial evidence and reasonable inferences arising therefrom can constitute satisfactory proof of the elements of a crime. *People v McRunels*, 237

Mich App 168, 181; 603 NW2d 95 (1999). Moreover, given the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient on that issue. *Id.*

At trial, the prosecution argued that defendant committed felony murder as either a principal or an aider and abettor.

> "The elements of felony murder are: (1) the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result [i.e., malice], (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in [the statute, including (robbery) ]." [*Nowack, supra* at 401, quoting *People v Carines*, 460 Mich 750, 758-759; 597 NW2d 130 (1999).]

To convict a defendant of felony murder as an aider and abettor, the prosecution must prove:

> (1) the crime charged was committed by defendant or some other person, (2) defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time that he gave the aid and encouragement. An aider and abettor must have the same requisite intent as that required of a principal. Thus, "the prosecutor must show that the aider and abettor had the intent to commit not only the underlying felony, but also to kill or cause great bodily harm, or had wantonly and willfully disregarded the likelihood of the natural tendency of this behavior to cause death or great bodily harm." [*People v Tanner*, 255 Mich App 369, 418-419; 660 NW2d 746 (2003) (citations omitted).]

Defendant does not dispute that there was sufficient evidence at trial to convict her of armed robbery. Nor does she dispute the sufficiency of evidence showing that the victims were killed during the course of that robbery. Rather, defendant argues that there was insufficient evidence to establish that she possessed the malice required for a conviction of felony murder, i.e., the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result. See *Nowack, supra*. We disagree.

As explained by the Court in *Nowack*, the malice necessary to support a conviction of felony murder may be inferred '"from evidence that the defendant intentionally set in motion a force likely to cause death or great bodily harm.'" *Id.* at 401, quoting *Carines, supra* at 759. In the present case, defendant admitted to police that she went to the victims' house with the intention of robbing one of its occupants. Although defendant claimed, both at trial and in her statement to police, that it was Clarke who murdered the victims after arriving at the house, and that she did not know that Clarke was armed with a handgun when the two entered the home, the prosecution offered evidence sufficient to contradict defendant's claims. Harry Trombley, who spent a good portion of the evening with the codefendants, testified on behalf of the prosecution that when the codefendants left for the victims' house it was defendant, not Clarke, who was carrying the handgun ultimately used to murder the victims during the course of the robbery.

Additional evidence at trial, including that offered by defendant during her own testimony, showed that defendant was aware that Clarke had purchased ammunition for the weapon earlier that evening and had in fact loaded and fired the weapon at least twice.

In *People v Turner*, 213 Mich App 558, 571-572; 540 NW2d 728 (1995), this Court concluded that a defendant's knowledge that his cofelon was armed with a loaded firearm during the commission of a robbery is enough for a rational trier of fact to find that the defendant, as an aider and abettor, participated in the crime with knowledge of the principal's malicious intent.[1] Thus, even assuming that Trombley's testimony placing the murder weapon in defendant's possession only minutes before the killings was inadequate to convince the jury that defendant, and not Clarke, fired the fatal shots and was thus guilty as a principal, that testimony was nonetheless sufficient to support finding that defendant was aware of the likelihood that a loaded firearm might be used in the robbery. Under such circumstances, a rational trier of fact could further find that by participating in the robbery as an aider and abettor, defendant acted with wanton and wilful disregard for the likelihood that the natural tendency of that behavior would be to cause death or great bodily harm. *Id*.; see also *Tanner*, *supra*. We find that when viewed in the light most favorable to the prosecution, the evidence at trial was sufficient to support defendant's convictions of felony murder.

II. Late Endorsement of Witness by Prosecution

On the ninth day of trial defendant joined Clarke in a motion opposing the late endorsement of codefendant Kevin Debus, who was alleged to have participated in the robbery by providing transportation to and from the victims' house. In challenging the endorsement, notice of which was provided to them fifteen days earlier, the codefendants argued that the prosecution had violated the thirty-day notice provisions of MCL 767.40a(3). Although acknowledging that the trial court could nonetheless permit the late endorsement for "good cause shown," see MCL 767.40a(4), the codefendants further argued that to permit Debus to testify before their juries on such short notice would unfairly prejudice their already prepared defenses.

In response, the prosecution argued that it could not endorse a codefendant as a witness unless and until it was clear that the codefendant would waive his right against self-incrimination and elect to testify at trial. The prosecution further argued that, pursuant to *People v Hana*, 447 Mich 325; 524 NW2d 682 (1994), once it is determined that a codefendant in a joint trial will waive his right against self-incrimination and testify on his own behalf, the prosecution may endorse the codefendant as a witness against the remaining defendants so long as the codefendants' defenses are not so antagonistic as to be "mutually exclusive."[2]

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[1] We reject defendant's assertion that *Turner* effectively "abrogates" the requirement of individual culpability, set forth by our Supreme Court in *People v Aaron*, 409 Mich 672, 731; 299 NW2d 304 (1980), in all cases where armed robbery is the predicate offense for a charge of felony murder. To the contrary, the culpability requirement of *Aaron* is satisfied in the *Turner* analysis by the defendant's individual knowledge that such an inherently dangerous item will be a part of the robbery.

[2] In *Hana*, the Court defined mutually exclusive defenses as those by which "'in order to believe
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The trial court, without expressly addressing whether the prosecution had established good cause for the late endorsement, found that Debus's defense was not mutually exclusive to that of the remaining codefendants and that, because neither of the remaining codefendants had shown any substantial prejudice arising from the testimony expected from Debus, Debus would be permitted to testify before all three juries. On appeal, defendant argues that the trial court erred in permitting Debus to testify before her jury because the prosecution failed to establish good cause for the late endorsement. We disagree.

As correctly noted by defense counsel at trial, MCL 767.40a(3) requires that the prosecutor send to the defendant, not less than thirty days before trial, a list of the witnesses the prosecutor intends to produce at trial. However, MCL 767.40a(4) allows a prosecutor to add or delete from the witness list at any time upon leave of the court and for good cause shown. A trial court's decision to allow a late endorsement of a witness is reviewed for an abuse of discretion. *People v Burwick*, 450 Mich 281, 291; 537 NW2d 813 (1995). Even where the statute has been violated, however, no error requiring reversal will be found absent a showing that the defendant was prejudiced by the late endorsement. *People v Williams*, 188 Mich App 54, 58-59; 469 NW2d 4 (1991).

Although the trial court did not expressly accept or reject the prosecution's proffered justification for the late endorsement of codefendant Debus, we find that the prosecution's inability to endorse him, as a witness in its case in chief, because he had not yet elected to testify to be sufficient good cause to permit the late endorsement at issue here. In reaching this conclusion, we reject defendant's assertion that we are constrained from so finding by *People v Rode*, 196 Mich App 58, 67-68; 492 NW2d 483 (1992), rev'd on other grounds 447 Mich 325; 524 NW2d 682 (1994). Contrary to defendant's assertion, the panel in *Rode* did not reject such justification as insufficient to establish good cause for the late endorsement of a codefendant pursuant to MCL 767.40a. Rather, the panel found that the prosecutor's failure to offer any explanation regarding why the codefendants were not added to the witness list until the first day of trial insufficient to establish the required good cause. *Id*.

In any event, even were we to conclude that the prosecution failed to show good cause for the late endorsement at issue, no error requiring reversal will be found absent a showing that the defendant was prejudiced by the late endorsement. *Williams*, *supra*. We find no such prejudice here. Although defendant argues that the unfair surprise stemming from the late endorsement prevented her from impeaching or otherwise defending against Debus's testimony, it was acknowledged below that the codefendants were given notice of the prosecutor's intent to call Debus as a witness, should he waive his right against self-incrimination, fifteen days before Debus actually testified. While not sufficient to satisfy MCL 767.40a(3), such notice provided ample time to prepare for Debus's testimony.

Moreover, by the time Debus testified, Trombley had already placed the murder weapon in defendant's possession shortly before the robbery in which defendant acknowledged she

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the core of the evidence offered on behalf of one defendant, [the jury] must disbelieve the core of the evidence offered on behalf of the co-defendant.'" *Id*. at 350, quoting *State v Kincade*, 140 Ariz 91, 93; 680 P2d 801 (1984).

willingly chose to participate. Furthermore, Debus's defense was that he had no idea that his female cofelons planned to rob the victims and believed he was taking the girls to the victims' house to "turn a trick." There was nothing antagonistic in this defense relative to that offered by defendant. See *Hana*, *supra* at 350. Finally, during his testimony Debus expressly stated that he did not see either of his codefendants with a weapon before returning to the victims' home, that he had never discussed the shootings with either of his alleged accomplices and that, therefore, he could not speak to which one actually killed the victims. In sum, we find nothing in Debus's testimony that is even inculpatory to defendant, much less, sufficiently prejudicial to warrant reversal.

We affirm.

/s/ Richard A. Bandstra
/s/ Helene N. White
/s/ Pat M. Donofrio